Supreme Court, U.S.
FILED

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In the
Supreme Court of the United States

CHARLENE C. RAMOS,
Petitioner,

v.

WILLIAM J. NEMETZ and TODD FREY,
Respondents.

Petition For a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. When a confidential informant's tip, that a specific person has drugs in his car, provides the basis for a warrantless vehicle stop, does the Fourth Amendment prohibit the warrantless arrest of other persons in the vehicle, whose presence was unpredicted by the tip, on the theory of constructive possession?

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PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice of the United States, and the Honorable Associate Justices of the Supreme Court of the United States:

The Petitioner, Charlene C. Ramos, prays that a Writ of Certiorari issue to review judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Third Circuit rendered on March 13, 1997 is unrecorded and appears at page 16a of the Appendix.

The Order of the United States District Court for the United States District Court for the Eastern District of Pennsylvania rendered on May 30, 1996 is unrecorded and appears at page 1a of the Appendix herein.

JURISDICTION

The final Order of the Court of Appeals for the Third Circuit was dated March 13, 1997 and this Petition for Certiorari is timely filed within ninety (90) days thereof.

FEDERAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution.

STATEMENT OF THE CASE

In this case, Petitioner was arrested solely due to her coincidental presence in a car with her estranged spouse who, unknown to her, was engaged in selling illegal drugs and had drugs in the car with him. Petitioner contends that her warrantless arrest by Respondent police officers was without probable cause, because Respondents had no reason to believe that Petitioner had anything to do with the drugs Respondents found during their warrantless search of the car that Petitioner's estranged husband was driving, and hence unconstitutional.

Under United States v. Ross, the warrantless arrest of Petitioner's estranged husband, Luis Ramos, was permissible under the Fourth Amendment because the substantial corroboration of a confidential informant's tip gave

Respondent police officers probable cause to believe that Luis Ramos was engaged in illegal activity. However, the tip had to conform to the "totality of the circumstances" approach announced in Illinois v. Gates, in order to be deemed reliable enough to form the basis for a warrantless search and arrest. Since the tip accurately predicted the appearance of Luis Ramos, the time and place of his arrival, and the type of vehicle he would be driving, the tip provided Respondent police officers with probable cause under the totality of circumstances.

However, Petitioner urges that since the informant's tip did not mention her, police had no reason, under the totality of circumstances test, to arrest her. In fact, Petitioner claims that since the confidential informant did not mention her, if the tip was accurate, the tip

gave Respondent police officers a reason to think that Petitioner was not involved with the drugs found in the car in which she was riding.

After a warrantless stop of a vehicle based on the tip of a confidential informant, in order to effect a warrantless arrest for constructive possession of contraband found in a car in which a person is a passenger, the police must have some reason to believe that the person owns, or at least knows about the presence of the contraband in the vehicle. Since the confidential informant's tip is substituting for a warrant, probable cause ought to be limited to those persons indicated by the tip. In this case, such a rule would make Petitioner's arrest illegal, because she was not named in or otherwise indicated by the tip, and

in fact had nothing to do with the drugs found by Respondent police officers.

STATEMENT OF THE FACTS

Petitioner, Charlene C. Ramos, is an adult female who does not use illegal drugs. Prior to this incident, Petitioner had never been accused of or arrested for involvement with illegal drugs.

On August 4, 1994, Petitioner was separated and living apart from her husband and father of her children, Luis Ramos. Petitioner wanted to take her five year old son swimming, and when she noticed her husband driving through her neighborhood, she asked him for a ride to the pool. Luis told Petitioner that he "had something to do," but reluctantly agreed to drive them. Luis told Petitioner that he needed to pick up a friend on the way.

Unknown to Petitioner, Luis had completely concealed a quantity of marijuana under the front seat of the car. Also unknown to Petitioner, Luis had arranged to sell drugs to a confidential informant, and was on his way to deliver them. The confidential informant told police that "One Eyed Louie," a Hispanic male, was going to be delivering one pound of marijuana in a gray Ford at 2:30pm in Bucky Boyle Park. The informant never mentioned Petitioner, or even that "One Eyed Louie" might have an accomplice with him.

When Luis Ramos arrived near Bucky Boyle Park at approximately 2:30pm, as predicted by the informant, police stopped his car, searched it, found the marijuana under the front seat, and arrested Luis Ramos. Petitioner was also arrested at this time, on the theory of

constructive possession of the marijuana. Other than her presence in the car, no objective facts supported an inference that Petitioner had anything to do with the drugs. Petitioner was released shortly after her arrest, and charges against Petitioner were soon dropped.

Petitioner brought an action in Federal District Court against the arresting officers, alleging, inter alia, that her warrantless arrest was unconstitutional. At the close of Petitioner's evidence, the trial judge granted a directed verdict in favor of Respondents. Petitioner then appealed to the Court of Appeals for the Third Circuit, who affirmed the trial judge's granting of the directed verdict.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

This case presents this Honorable

Court the opportunity to further refine the "totality of the circumstances" approach announced in Illinois v. Gates. Particularly, this Court should decide whether the "circumstances" which provide probable cause to arrest one defendant without a warrant can be automatically imputed to anyone in the vicinity, on the theory of constructive possession.

The "totality of the circumstances" test is only relevant where the police seek to subvert the warrant requirement because an informer's tip is so apparently reliable, as when a tip's details are corroborated by facts subsequently uncovered by police investigation. When a confidential informant's tip gains this aura of constitutional reliability, sufficient to excuse the otherwise strict warrant requirement, the police should be bound

by the tip's details. If a tip identifies a specific person as the owner of contraband, the police should not be able to arrest additional people along with the suspect solely due to the others proximity to the contraband. To allow the police to use the theory of constructive possession to expand the scope to the tip is to inherently impugn the credibility of the tip. Such a result undercuts the essential holding of Illinois v. Gates, which says that only an extremely reliable tip can substitute for the warrant that would otherwise be required. This Court should hear this case in order to determine whether the police can have "the best of both worlds" with confidential informants' tips; that is, can a tip be reliable enough to support the warrantless search and arrest of someone alleged by an informant to

possess contraband, but not reliable enough to limit probable cause to the named suspect, excluding others who may have been in close proximity to the contraband? Such a result allows the police to ignore what is the essence of a tip, the identity of the guilty party, and arrest anyone in the vicinity of contraband for constructive possession, without a warrant or independent probable cause of any kind. This Court should take this case to avoid such a disastrous result.

ARGUMENT

I. WHEN A CONFIDENTIAL INFORMANT'S TIP, THAT A SPECIFIC PERSON HAS DRUGS IN HIS CAR, PROVIDES THE BASIS FOR A WARRANTLESS VEHICLE STOP, DOES THE FOURTH AMENDMENT PROHIBIT THE WARRANTLESS ARREST OF OTHER PERSONS IN THE VEHICLE, WHOSE PRESENCE WAS UNPREDICTED BY THE TIP, ON THE THEORY OF CONSTRUCTIVE POSSESSION?

A. **An important element in "totality of the circumstances" analysis is**

corroboration of even minute details of a confidential informant's tip. The tip of a confidential informant is presumed to be reliable when the tip predicts innocent things about a suspect's behavior that do not, in themselves, indicate any type of criminal activity. See, Arkansas v. Sanders, 442 U.S. 753, 761 (1978) (crediting the accuracy of a tip which predicted that suspect would be carrying a green suitcase). However, an informant's tip need not be accurate in absolutely every respect to be considered reliable. See, Illinois v. Gates, 462 U.S. 213 (1983) (holding an anonymous letter could provide probable cause to support issuance of a warrant even though the tip did not perfectly predict the suspects' travel habits).

In this case, a confidential informant predicted where, at what time,

and in what kind of car Luis Ramos would arrive to attempt to deliver illegal drugs to the informant. If the corroboration of those details is sufficient to support a warrantless search of Luis Ramos' car, Luis Ramos must be considered to be connected to the drugs. The informant's tip did not give police any reason to think that a passenger in Luis Ramos' car had anything to do with the drugs he had there. The tip could not provide any connection between Petitioner and the drugs, because the tip did not even mention her. Therefore, there could be no probable cause to suspect Petitioner's involvement of the drugs, and hence no probable cause to effect her warrantless arrest.

B. **Allowing passengers in a vehicle containing contraband to be automatically arrested without a warrant for**

constructive possession of the contraband is unconstitutional under Fourth Amendment. Police derive great benefit in law enforcement from the use of confidential informants. However, when police act on a tip, they should be bound by its terms, unless subsequent investigation shows that the tip is inaccurate or incomplete. Had police made a routine traffic stop of a car containing Luis Ramos and Petitioner, and thereafter legally seized contraband from the car, both of them could be arrested for constructive possession, because police would have no way to know which of them owned the contraband. But where police know that Luis Ramos owned the contraband, because their confidential informant told them so, and stop his car on the basis of that information, they should not automatically be able to

arrest Petitioner just because she was an occupant of the car. In order to arrest for constructive possession, police must have some reason to connect the arrestee to the contraband besides mere proximity. See, Ybarra v. Illinois, 444 U.S. 85, 90 (1979) ("[A] person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person.") In this case, Respondent police officers had less than no reason to suspect Petitioner of illegal activity; their presumed reliable informant failed to mention her, or even the possibility of an unknown accomplice. Hence, the warrantless arrest of Petitioner for nothing more than riding in a car which, unknown to her, had drugs concealed within it, does not constitute probable cause to arrest her, making her

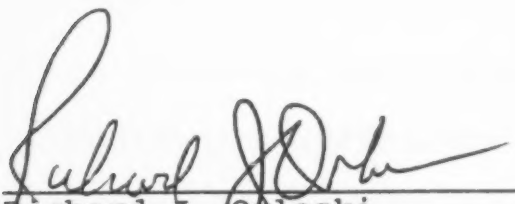
warrantless arrest unconstitutional.

CONCLUSION

For the foregoing reason, this Petition for Writ of Certiorari ought to be granted.

Respectfully submitted,

ORLOSKI & HINGA



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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHARLENE C. RAMOS	:	CIVIL ACTION
V.	:	
WILLIAM NEMETZ, et al.	:	NO. 95-4650

CAHN, C.J.

(Transcript of Bench Opinion)

THE COURT: In the case of Charlene C. Ramos versus William J. Nemetz and Todd Frey, the plaintiff has presented her case in chief. And at the close of her case in chief, a directed verdict was granted in favor of the defendant, Todd Frey.

The case continued against the defendant, William J. Nemetz, but over the evening hour upon further research and reflection, I determined that a directed verdict should be entered in favor of William J. Nemetz as well.

I'm delivering this bench opinion in favor of both defendants. I reserve the

right to edit the bench opinion for errors in grammar, spelling, syntax and citation.

Agents of the Pennsylvania Attorney General's Office of the Bureau of Narcotics Investigation learned from a confidential informant that the confidential informant could purchase one-pound quantities of marijuana from a Hispanic male known as "One-Eyed Louie."

This confidential informant had been arrested by these agents several days prior to August 4th, 1994, the date when the incidents in this controversy took place. Following the arrest of the confidential informant, he provided reliable information on one or two occasions to the agents prior to this incident.

In reciting the facts about this incident, I will credit the testimony of the plaintiff, Charlene C. Ramos, as

accurate and all of the other facts will be construed in favor of the plaintiff.

Some time in the morning of August 4th, 1994, in Allentown, Pennsylvania, the agents worked out a "buy and bust" operation involving the confidential informant and One-Eyed Louie.

A briefing was conducted by the agents at about 1 pm at their office on Cedar Crest Boulevard in Salisbury Township, Lehigh County, Pennsylvania. At that time, the officers had information from the confidential informant that he was making arrangements to buy one pound of marijuana from One-Eyed Louie.

The agents' plan was to have the confidential informant call One-Eyed Louie to arrange for the time and place where the marijuana would be exchanged for cash. The confidential informant was to be the buyer.

At approximately 2:00pm, one of the agents and the confidential informant telephoned One-Eyed Louie. Only the confidential informant was on the line, but the agent could hear the confidential informant's side of the conversation. In this conversation, arrangements were made for the confidential informant to purchase one-pound of marijuana from One-Eyed Louie at Bucky Boyle Park in Allentown, Pennsylvania at 2:30pm. The agents had information that One-Eyed Louie was a Hispanic male, although they did not know his last name. The agents also had information that One-Eyed Louie would be arriving at Bucky Boyle Park in a gray Ford automobile.

Because the agents operated as plainclothes police officers, they elicited the aid of the Allentown Police Department so that a uniformed officer would be present at the time they made

their stop of One-Eyed Louie's vehicle.

The defendant, Todd Frey, was the Allentown police officer assigned to this task. The confidential informant and one of the agents waited near Bucky Boyle Park and they made radio contact with the other agents.

The confidential informant informed the agent who was with him that One-Eyed Louie was arriving in a gray Ford near Bucky Boyle Park. Following the relay of this information to other agents, Officer Todd Frey stopped the gray Ford vehicle. In the gray Ford vehicle were Luis Ramos, Charlene C. Ramos, and a five-year-old child of the couple. Mr. and Mrs. Ramos are married, but live separate and apart from each other.

A search of the vehicle revealed one-pound of marijuana under the driver's seat. It is undisputed that Luis Ramos was the driver of the vehicle and that he

was in fact One-Eyed Louie referred to by the confidential informant.

Both Charlene C. Ramos and Luis Ramos were arrested at the scene, transported to the Allentown Police Department, detained there and brought before a District Justice near the Allentown -- with an office near the Allentown Police Department.

Following their appearance before the District Justice, the plaintiff, Charlene C. Ramos, was released on her own recognizance. Several days later, the charges against her were dropped when her husband pleaded guilty to possession of the marijuana with intent to distribute it.

Several of Charlene C. Ramos's claims have been dismissed previously. What remained to be tried was her claim that during the arrest, excessive force was used in that the rear door of a

police cruiser was slammed on her left ankle causing injury. Her second claim was that her arrest was warrantless and illegal under the Fourth Amendment.

In regard to the claim of excessive force, I analyzed that claim under the reasonableness concept of the Fourth Amendment in accordance with the law applicable to excessive force claims. That law is found in Graham v. O'Connor, 490 U.S. 386 (1989). Graham holds that reasonableness is to evaluated from the viewpoint of an officer on the scene rather than with 20/20 vision of hindsight.

With respect to excessive force claims, the Court observed that "the same standard of reasonableness at the moment applies: 'Not every push or shove, even if it may later seem unnecessary in the peace of the judge's chambers violates the Fourth Amendment.'" Id. at 396.

Reasonableness is the touchstone of the inquiry.

In regard to the excessive force claim, I credit as accurate Mrs. Ramos' version that the car door was slammed on her left ankle by Frey. The problem with her claim is that the injury to her left ankle was only minimal. She walked a mile from the police station to her home after her release, and the next day on August 5th, 1994, she went to the Allentown Osteopathic Hospital at approximately 5:00pm.

The hospital records show that there were no fractures, that she had no difficulties and that the injury was similar to a mild brush burn. The records indicate that she was really given no treatment for this injury. She testified that at the end of three days there were no more problems with her left ankle from the incident.

At the scene Mrs. Ramos, while she was being arrested, jerked her elbow away from Officer Frey on several occasions. In a situation where an arrest of persons suspected of drug involvement is taking place, I do not believe that the facts of this case present a constitutional violation for excessive force. It is certainly unreasonable to slam a car door on an arrestee's left ankle.

However, common sense tells us that the slamming of a car door on an ankle would result in greater injuries than those suffered by Mrs. Ramos. The injury to her left ankle is not consistent with the slamming of a car door on it, and is more consistent with mild resistance to being taken into custody as plaintiff was placed in the police car.

It should be noted that Officer Frey denies there was any closure of the door on the plaintiff's left ankle, but for

the purpose of a Rule 50(a) motion the plaintiff's version must be credited.

I am also aware of Justice O'Connor's decision in Hudson v. McMillian, 117 L.Ed.2d 156 (1992), where she held that a correctional officer's punching an inmate in the mouth, which caused bruises, swelling, loosened teeth and a cracked dental plate is not de minimis for Eighth Amendment purposes.

Assuming that a Hudson-type inquiry would be applicable in an excessive force on arrest case rather than an Eighth Amendment cruel and unusual treatment case, I hold that the Hudson case does not control the situation at bar. This is especially true in light of the observation in the Graham case that not every push or shove rises to constitutional dimensions.

As far as the claim for unlawful arrest is concerned, I find that the

closest case which would shed light on this situation is United States v. De Los Santos, 810 F.2d 1326 (5th Cir. 1987). That case makes it clear that although warrantless searches and seizures are unreasonable under the Fourth Amendment, there are well-recognized exceptions.

One of these is that a police officer may make an arrest on probable cause. Probable cause is present when the facts and circumstances and context of the situation are within the knowledge of the arresting officer and are sufficient to cause a reasonable person to believe than an offense is being committed. The arresting officer does not need to have any personal knowledge of all of the facts and may rely on information received from other officers and confidential informants.

There must be some type of reliability in regard to confidential

informants and that test is set forth in Illinois v. Gates, 462 U.S. 213 (1983). Gates requires that to determine whether or not there is probable cause, one must examine the totality of circumstances to ascertain whether the informant's information, coupled with other facts known to the police officer and the overall context justifies a common sense decision as to whether or not there is a fair probability that contraband will be found in a particular place to pick-up narcotics.

Turning back to De Los Santos, there the officers had a confidential informant who proved reliable in the past and they knew the defendant dealt in heroin on previous occasions.

The informant told the officer that De Los Santos would be travelling to a particular place. The agents observed him do so and corroborated the

confidential informant by surveillance. The subsequent arrest and search was held to be lawful. Similarly in the case at Bar, the officers had probable cause under Gates and De Los Santos to stop the vehicle, make the search, and if contraband was found, arrest the occupants.

Counsel for the plaintiff urges that the plaintiff has raised a triable issue of fact by her testimony that at the time of her arrest Officer Frey told her she was being stopped for a robbery and that the car was connected to a robbery.

Although Officer Frey denies that he so informed the plaintiff, I credit plaintiff's version. The fact that the police officer made a misstatement, even a deliberate misstatement, to plaintiff at the time of the stop does not make the stop and search illegal or unreasonable.

There does not really seem to be

much question that the police officers had probable cause to stop the gray Ford, search it, and arrest Luis Ramos. Mrs. Ramos contends, finally, that it was unreasonable to arrest her merely because of her presence in the vehicle because she was within arms' reach of the contraband. The contraband was under the driver's seat. Luis Ramos was the driver.

The law in Pennsylvania is that a person may be charged with a narcotics offense if she is in constructive possession of the contraband, Commonwealth v. Marcolino, 469 A.2d 132, 134 (1983). At least at the scene of the arrest it was reasonable for the officers to detain both adults in the car pending a sorting out of the facts.

One reason I have decided to direct a verdict in favor of both defendants here is that they acted with eminent

reasonableness throughout this incident. No one was seriously hurt. The plaintiff was released after the facts became better known to the officers and shortly after her release the charges against her were dropped.

There is not an overtone of unreasonable police conduct in this incident. This opinion in filed in support of Rule 50(a) motions granted in favor of both defendants on May 30th, 1996. End of bench opinion.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 96-1506

CHARLENE C. RAMOS, Appellant

v.

WILLIAM J. NEMETZ; TODD FREY

Before: SCIRICA, ALITO, and LAY, Circuit Judges

Filed: Mar 13, 1997

MEMORANDUM OPINION

SCIRICA, Circuit Judge:

In this civil rights action, Charlene C. Ramos appeals a directed verdict in favor of the defendants. We will affirm.

I.

The district court had jurisdiction under 42 U.S.C. 1983 and 28 U.S.C. 1331 and 1343. We have jurisdiction under 28 U.S.C. 1291. Mody v. City of Hoboken, 959 F.2d 461 (3d Cir. 1992). A motion for a directed verdict should be granted only if, viewing the evidence in the

light most favorable to the non-moving party, there is no question of material fact for the jury, and any [other] than the one directed would be erroneous under the governing law. Our review of a directed verdict is plenary. MacLeary v. Hines, 817 F.2d 1081, 1083 (3d Cir. 1987).

II.

On August 4, 1994, a confidential informant told agents of the Pennsylvania Office of the Attorney General Bureau of Narcotics Investigation (BNI) that he could purchase one pound quantities of marijuana from a Hispanic male known as "One-Eyed Louie." The informant had previously provided reliable information on the previous day that led to a drug-related arrest. BNI agents and the Allentown Police Department planned a "buy and bust" operation in which the informant would make a controlled

purchase of marijuana from "One-Eyed Louie" later that day. The agents and the confidential informant called "one-Eyed Louie" on the telephone at 2:00pm and arranged to meet him at 2:30 in Bucky Boyle Park in Allentown, Pennsylvania. "One-Eyed Louie" would be driving a gray Ford.

That afternoon, Charlene Ramos arranged for her husband, Luis Ramos, to give her and their son a ride to a public swimming pool in his gray Ford. During the drive to the pool, Luis Ramos indicated that "he had something else to do" and drove with his wife and child to Bucky Boyle Park. At approximately 2:40pm, the Ramoses arrived at the park and the confidential informant identified the driver of the gray Ford as "one-Eyed Louie." Allentown Police Officer Todd Frey and BNI agent William Nemetz stopped the vehicle and confirmed that the driver

fit the description of "One-Eyed Louie." They asked the Ramoses to get out of the car and then searched the vehicle. Frey and Nemetz discovered one pound of marijuana under the driver's seat.

Luis and Charlene Ramos were arrested at Bucky Boyle Park and transported to the Allentown Police Department, where they were detained. It appears that during her brief detention, Charlene Ramos was restrained by an ankle bracelet attaching her securely to a bench. Following arraignment at 4:20 that afternoon, Charlene Ramos was released on her own recognizance and walked home. The next evening, she went to Allentown Osteopathic Hospital and asked to have her ankle examined. Hospital records show that Ramos's left ankle had "very minimal swelling" and redness "similar to a mild brush burn," but there was no fracture and no

treatment required. Several days later the charges against her were dropped when her husband pleaded guilty to possession of marijuana with intent to distribute.

On July 28, 1995, Charlene Ramos filed a civil rights action under 42 U.S.C. 1983 against BNI agent William Nemetz and Allentown Police officer Todd Frey. Ramos alleged that Officer Frey had slammed the rear door of his police cruiser on her left ankle during her arrest which amounted to an unconstitutional use of excessive force. Ramos also alleged that her arrest and the search of the gray Ford were unlawful, in violation of the Fourth Amendment, because Frey and Nemetz lacked probable cause. On May 29, 1996, her case went to trial. After Ramos presented her case in chief, the district court directed a verdict in favor of the defendants.

The district court noted Ramos's testimony that a car door had been closed on her ankle. It noted, however, that the evidence indicated that the injury to Ramos's ankle was minimal and inconsistent with her testimony that her ankle had been "slammed" in a car door. In Graham v. O'Connor, 490 U.S. 386 (1989), the Supreme Court stated that "[n]ot every push or shove, even if it may later seem unnecessary in the peace of the judge's chambers, violates the Fourth Amendment." Under these facts, the court believed that Ramos' injury did not rise to constitutional dimensions.

With regard to Ramos' unlawful search and arrest claim, the district court held that the police had probable cause to stop and search the gray Ford, and that "it was reasonable for the officers to detain both adults pending a sorting out of the facts." The court

then observed: "One reason I have decided to direct a verdict in favor of the defendants here is that they acted with eminent reasonableness throughout this incident. No one was seriously hurt. The plaintiff was released after the facts became better known to the officers and shortly after her release the charges against her were dropped. There is not an overtone of unreasonableness in this incident." This appeal followed.

III.A.

There is a cause of action under 42 U.S.C. 1983 when a law enforcement officer uses force so excessive that it violates the Fourth and Fourteenth Amendments to the United States Constitution. Graham v. Connor, 490 U.S. 386, 394-95 (1989); Groman v. Township of Manalapan, 47 F.3d 628, 633-34 (3d Cir. 1995). Police officers may commit a battery pursuant to a lawful arrest, but

the privilege is negated by the use of excessive force. Groman, 47 F.3d at 634; Edwards v. City of Philadelphia, 860 F.2d 568, 572 (3d Cir. 1988). To determine whether force was excessive, courts apply a reasonableness standard. Graham, 490 U.S. at 396; Groman, 47 F.3d at 634. The reasonableness of the officer's use of force is measured by careful attention to the facts and circumstances of each case. Id. The reasonableness inquiry is objective, but should give appropriate scope to the circumstances of the police action, which are often tense, uncertain, and rapidly evolving. Graham, 490 U.S. at 397; Groman, 47 F.3d at 634.

As we have noted, the Supreme Court said in Graham v. Connor that "[n]ot every push or shove, even if it may later seem unnecessary in the peace of the judge's chambers, violated the Fourth Amendment." Graham, 490 U.S. at 396

(citation omitted). A defendant, therefore, may be granted judgment as a matter of law in a 1983 case where the police conduct, though somewhat less than gentle, in not objectively unreasonable. See, e.g., Martin v. Malhoyt, 830 F.2d 237 (D.C. Cir. 1987) (Ginsburg, J.) (in a 1983 case, police officers were entitled to judgment as a matter of law; slamming of car door on plaintiff's legs not unreasonable under the circumstances).

Here, hospital records proved only that Ramos's ankle had "very minimal swelling" and redness "similar to a mild brush burn," with no fracture and no need for treatment. Moreover, Ramos stated that she walked home after the incident, and she was not even sure that defendant Frey knew her leg was in the door when he closed it. Under these circumstances, we agree with the district court that the defendants were entitled to a directed

verdict on Ramos's excessive force claim.

III.B.

Neither the search of the gray Ford nor Charlene Ramos's subsequent arrest were unlawful. If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment permits police to search the car without a warrant. Pennsylvania v. Labron, 116 S.Ct. 2485, 2487 (1996). Probable cause exists where, under all the circumstances, and given the informant's information and other facts known to the police, there is a fair probability that contraband or evidence of a crime will be found in a particular place. Illinois v. Gates, 462 U.S. 213, 238 (1983). Here, the police learned from an informant, who had provided reliable information the prior day, that a one-eyed Hispanic male named "One-Eyed Louie," whom the informant could identify

by sight, was prepared to sell marijuana by the pound. The police confirmed, through a supervised and controlled telephone call placed by their informant, that "One-Eyed Louie" would be at Bucky Boyle Park at 2:30 on that afternoon in a gray Ford, prepared to sell one pound of marijuana. A gray Ford driven by a one-eyed Hispanic male arrived at that park shortly after 2:30, and the informant confirmed that the driver was "One-Eyed Louie." Under these circumstances, the police were clearly justified in believing there was a fair probability that the gray Ford possessed contraband. For this reason, the search of the automobile was lawful.

One the police discovered the marijuana, they were justified in arresting Charlene Ramos. The marijuana was discovered under the front seat, where Charlene Ramos had been sitting,

and was within her reach. Under Pennsylvania law, a person may be charged with a narcotics offense if he or she is in constructive possession of contraband. Commonwealth v. Marcolino, 469 A.2d 132, 134 (1983). Under these circumstances, the officers had probable cause to arrest Ramos after the search.

For these reasons, we will affirm the judgment of the district court directing a verdict in favor of the defendants.

Supreme Court, U.S.
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NO. 96-1978

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1997

CHARLENE RAMOS,
Petitioner

v.

WILLIAM NEMETZ, et al.,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RESPONDENT WILLIAM NEMETZ' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court's decision in Illinois v. Gates, 462 U.S. 213 (1982), should be revisited?

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STATEMENT OF THE CASE

Petitioner, Charlene C. Ramos, has petitioned the Court to grant certiorari to reverse a judgment of the United States Court of Appeals for the Third Circuit. That judgment affirmed the entry of a directed verdict against Petitioner in a civil rights action she brought against the respondents, two law enforcement officers, who arrested her for possession of illegal drugs. The respondents, William J. Nemetz, a Pennsylvania Office of Attorney General Narcotics Agent, and Todd Frey, a City of Allentown Police Officer, arrested Petitioner on August 14, 1994.[1]

1. On that date, the respondents learned from a reliable, confidential informant that he could purchase one-pound quantities of marijuana from a supplier nicknamed "One-Eyed Louie." App. 2A, 17A, 25A. A "buy bust" was arranged for later that day, when the confidential informant would purchase one pound of marijuana from One-Eyed Louie and the respondents would arrest him. App. 3A-4A, 17A-18A, 26A. The confidential informant did not know One-Eyed Louie's real name but described him as an Hispanic male. App. 2A, 4A, 17A, 25A. One-Eyed Louie agreed to meet the informant in Bucky Boyle Park at 2:30 p.m. App. 4A, 18A, 26A. The informant advised the respondents for whom he was working that One-Eyed Louie would be driving a gray Ford automobile. *Id.*

As predicted, at about 2:30 p.m., the confidential informant saw One-Eyed Louie driving a gray Ford near Bucky Boyle Park. App. 5A, 18A, 26A. The informant told respondents and they stopped the gray Ford. *Id.* In the car were Luis Ramos, his wife Charlene (the petitioner), and their five-year old son. *Id.* Luis Ramos fit the description of One-Eyed Louie. App. 5A-6A. Respondents asked the Ramoses to step out of the car. App. 19A. Agent Nemetz searched the car and found one pound of marijuana under the driver's seat. App. 5A, 19A.

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[1] All citations herein are to the Appendix attached to the petition for writ of certiorari.

The petitioner owned the gray Ford that Luis Ramos was driving. When the car was stopped, she was seated in the front, passenger seat, App. 26A, the marijuana within reach. App. 26A. Petitioner and her husband were arrested. The charges against petitioner were later dropped when Luis Ramos agreed to plead guilty to charges of possession of a controlled substance and possession of a controlled substance with intent to deliver. App. 6A, 20A.

2. Petitioner then brought a civil rights action against the respondents alleging, among other things, that they had violated her Fourth and Fourteenth Amendment rights by arresting her without probable cause. The case proceeded to a non-jury trial, and the district court, in a bench opinion, concluded that Agent Nemetz had probable cause to stop the vehicle, make the search and arrest the petitioner under the theory of constructive possession. App. 14A. Petitioner appealed.

3. The Court of Appeals affirmed. Citing *Illinois v. Gates*, 462 U.S. 213 (1983), the court explained that "probable cause exists where, under all the circumstances, and given the informant's information and other facts known to the police, there is a fair probability that contraband or evidence of a crime will be found in a particular place." App. 25A. After reciting the circumstances leading to the search, the court concluded that it was lawful. App. 26A. The court also concluded that there was probable cause for petitioner's arrest: "Once the police discovered the marijuana, they were justified in arresting Charlene Ramos. The marijuana was discovered under the front seat, where Charlene Ramos had been sitting, and was within her reach. Under Pennsylvania law, a person may be charged with a narcotics offense if he or she is in constructive possession of contraband." App. 26A-27A.

Petitioner now asks the Court to issue a writ of certiorari.

REASONS FOR DENYING THE WRIT

THIS CASE DOES NOT MERIT REVIEW BY THE COURT

1. This case does not present any significant or important issue to justify review by the Court. Petitioner attempts to present the case as one involving an important question of law, *i.e.*, the need to refine the "totality of the circumstances" test for determining the reliability of a confidential informant as announced in *Illinois v. Gates*, 462 U.S. 213, 230 (1982). Petitioner, however, mischaracterizes the case. She was arrested, not in improper reliance on the informant's tip, but because, having acted on the tip and searched her car as petitioner concedes they were entitled to do, respondents concluded that she was in constructive possession of narcotics they found there.

As petitioner admits (Petition, pp. 3-4), there was probable cause here, based on the substantial corroboration of the confidential informant's tip, *see Illinois v. Gates*, for the respondent law enforcement officers to believe that Luis Ramos was engaged in illegal activity, justifying the officers' warrantless stop and search of the vehicle. Thereafter, petitioner was not just "anyone in the vicinity" (Petition, pp. 9, 11) nor was she "automatically arrested." (Petition, p. 13.) Rather, once Agent Nemetz found the pound of marijuana in the car under the driver's seat, the facts and circumstances within his knowledge, *i.e.*, Ms. Ramos' presence in the car, her ownership of the car, her relationship to the driver and her proximity to the drugs just in advance of the prearranged drug sale, App 26A-27A, were such that he had probable cause, independent of the informant's tip, to believe that petitioner was in possession, or at least constructive possession, of a controlled substance.

2. There is no warrant for the Court to revisit *Illinois v. Gates* and modify it, as petitioner suggests, to eviscerate the law of constructive possession. Petitioner has pointed to no conflicts among the circuits concerning the "totality of circumstances" test announced in that case, and she has not pointed to cases that suggest that, since the decision was handed down in 1983, lower courts have had difficulty in applying its holding, or that the test

has proved unworkable. Rather, this is simply a case in which the petitioner asks the Court to rewrite settled law so as to benefit her in her civil action. The Court should deny the petition.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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